Supreme Court, U.S.
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No. _____

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1994

JESUS MANUEL FERNANDEZ,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT AND SUPPORTING BRIEF

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50 pp

ISSUE PRESENTED FOR REVIEW

WHETHER AN INDICTMENT WITH TWO REDUNDANT COUNTS - COUNTS CHARGING THE EXACT SAME SINGULAR INSTANCE OF MISCONDUCT - THAT RESULTS IN AN ACQUITTAL AND A CONVICTION REQUIRES A REVERSAL OF THE CONVICTION.

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APPENDIX EXHIBIT LIST

Appendix A – Opinion of the United States Court of Appeals for the Eleventh Circuit dated July 29, 1994.

Appendix B – Opinion of the United States Court of Appeals for the Eleventh Circuit dated October 18, 1994.

Appendix C – Judgment including Sentence of the United States District Court for the Southern District of Alabama dated December 19, 1990.

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

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October Term, 1994

JESUS MANUEL FERNANDEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF
CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner Jesus Fernandez prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered on July 29, 1994.

1. OPINIONS BELOW

On July 29, 1994, the court of appeals for the Eleventh Circuit entered its opinion affirming Fernandez's conviction. A copy of the opinion is attached as Appendix A. Fernandez's Petition for Rehearing was denied on October 18, 1994. A copy of the opinion is attached as Appendix B. The district court's judgment and sentence is attached as Appendix C.

2. STATEMENT OF JURISDICTION

This court has jurisdiction under 28 U.S.C. § 1254(19) and § 2191 over this appeal of a conviction after trial.

3. RELEVANT CONSTITUTIONAL AND STATUTORY PROVISION

The Fifth Amendment to the United States Constitution

No person shall be held to answer for a capital, or other infamous crime, unless on a presentment or an indictment of a grand jury, except in cases arising in the land or naval forces or in the militia, when an actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

21 U.S.C. 802: Delivery and Distribution

(8) The terms "deliver" or "delivery" mean the actual, CONSTRUCTIVE, or ATTEMPTED transfer of a controlled substance or a listed chemical, whether or not there exists an agency relationship.

(11) The term "distribute" means to DELIVER (other than by administering or dispensing) a controlled substance or a listed chemical. The term "distributor" means a person who so delivers a controlled substance or a listed chemical. (Emphasis added.)

21 U.S.C. § 841(a)(1): Unlawful acts

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally –

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance;

. . .

21 U.S.C. § 846: Attempt and conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

THE INDICTMENT

COUNT IV

From in or about March, 1990, to and continuing through on or about April 18, 1990, the in the Southern District of Alabama, Southern Division, Joseph Thomas Marino, Irving Schwartz, aka Gus, aka William Huff, Daniel Lee Deatherage, Oscar Diaz, Ramon Rodriquez, Jr., Manuel Jose Ruiz, Al Pastor, Samuel J. Degiso, Kelly Fred Kalinowski, Robert Lincoln Fowler, and Jesus Manuel Fernandez, did wilfully, knowingly, and unlawfully, attempt to commit an offense against the United States, to wit:

To knowingly and intentionally possess with intent to distribute approximately 1,000 kilograms of cocaine, a Schedule II controlled substance, in violation of Title 21, United States Code, Section 841(a)(1).

All in violation of Title 21, United States Code, Section 846, and Title 18, United States Code, Section 2.

COUNT V

From in or about March, 1990, and continuing thereafter through on or about April 18, 1990, in the Southern District of Alabama, Southern Division, and elsewhere, Joseph Thomas Marino, Irving Schwartz, aka Gus, aka William Huff, Daniel Lee Deatherage, Oscar Diaz, Ramon Rodriquez, Jr., Manuel Jose Ruiz, Al Pastor, Samuel J. Degiso, Kelly Fred Kalinowski, Robert Lincoln Fowler, and Jesus Manuel Fernandez, knowingly and intentionally did unlawfully distribute and possess with intent to distribute approximately 500 kilograms of cocaine, a Schedule II controlled substance, in violation of Title 21, United States Code, Section 841(a)(1).

COURT'S JURY CHARGE: "ATTEMPT"

In summary, Count 1 of each indictment charges that all the defendants knowingly and willfully conspired together to distribute and possess with intent to distribute cocaine in violation of the law...

Count four charges that all of the defendants attempted to distribute and possess with intent to distribute cocaine in violation of the law.

And, finally, count five charges the commission of a substantive offense, namely that all of the defendants did distribute and possess with intent to distribute cocaine in violation of the law.

Now, I will explain the law governing count five [this] substantive offense later, but first, however, as to count one and four you will note the defendants are not charged in that offense with having committed these substantive offense[s]. Rather they are charged with having either conspired to do it or with attempting to do so. Which is in violation of another section of the law.

Now an attempt, let me defend [sic] that for you, to commit an offense as charged in Count two and four, consist[s] of an act which is [sic] done with specific intent to commit a particular crime and is reasonably adapted to the accomplishment of that.end.

(R22- 2102-04).

STATEMENT OF THE CASE

A. Procedural History

On April 19, 1990, Jesus Manuel Fernandez was indicted in a five (5) count drug trafficking indictment alleging conspiracy to distribute and possess with intent to distribute cocaine (Count I), attempt to import cocaine (Count II), conspiracy to import cocaine (Count III), attempt to possess with intent to distribute cocaine (Count IV), and distribution and possession with intent to distribute cocaine (Count V).

On October 2, 1990, following a ten (10) day jury trial, his motion for judgment of acquittal as to Count II and Count III was granted. On October 5, 1990, the jury returned a verdict of not guilty as to Count I and not guilty as to Count IV, but a verdict of guilty as to Count V.

On December 19, 1990, judgment was entered ordering that the defendant be imprisoned for a term of 328 months (27.33 years) followed by a supervised release term of five (5) years.

He appealed and on July 29, 1994, a panel of the Eleventh Circuit Court of Appeals affirmed his conviction. Fernandez filed a petition for rehearing which was denied on October 18, 1994.

B. Statement of the Facts

On April 18, 1990, the appellant arrived at a farm in Baldwin County, Alabama, during an off load of cocaine. He, along with co-appellant Pastor, were licensed owner/operators of the tractor/trailers. There was extensive evidence involving the ongoing negotiations between others, undercover customs agents and operatives. The appellant had no part in any discussions or negotiations nor had he ever been placed by the government as ever having taken part of any kind of illicit activity prior to the date of arrest. The evidence introduced at trial painted a picture of an enterprise consisting of vastly differing shades and tiers of involvement. The appellant's role, however, was limited to that of truckdriver. (R6-1545; R22-1686). On the morning of April 18, one of those supervising co-defendants

informed the agents that the vehicles had arrived in Pensacola, Florida, and that Schwartz and Deatherage were "going to go over there and take care of the truck drivers and get them back over here." (R17-649).

Customs agents drove to a truckstop and met Schwartz. (R18-1018-1019, R17-652). Schwartz said that he had two trucks and a small car or minivan. (R18-1019). The vehicles were bound for Miami. (*Id.*). Schwartz identified the six or seven people at the truckstop as his drivers. (R18-102, R17-735).

They drove the two eighteen-wheelers and the car into the building. (R18-1023). Once inside, the undercover agents unloaded the duffle bags that had been stored in the back of another truck already inside the building. (R18-1024, R17-735). There were 500 packages of what was later revealed to be cocaine stored in the duffle bags. (R18-1116). As the packages were counted, some of them were replaced into the duffle bags and were loaded into one of the trucks. (R18-1030).

Marino and Winberg had remained in Marino's hotel room. (R17-650). Soon thereafter, Marino and Schwartz were arrested at the hotel. (*Id.*). The appellant, along with co-appellants Al Pastor, Robert Fowler, Kelly Kalinowski, Deatherage, Oscar Diaz, Manuel Ruiz, Degiso, and Ramon Rodriguez were arrested at the load site. (*Id.*).

REASONS FOR GRANTING THE WRIT

Counts IV and V share identical elements and arise from a single act and course of conduct. While one course of conduct may violate different statutes and result in multiple punishments, in this case it became obvious at the close of the government's case that there was only one distribution that had been worded in the indictment as a 1,000 kilogram deal and then as a 500 kilogram deal. The indictment permitted the jury to both acquit and convict Fernandez of the same crime and this was error. At best, the government's proof at trial was either that Fernandez sought to possess or that he constructively possessed a shipment of cocaine. It could not be both. Government agents, the covert supplies of the cocaine, delivered only half of the proposed 1,000 kilograms. The promised cocaine formed the basis of one count and the delivered cocaine formed the basis of the other.

As the trial testimony showed, both counts -- each having identical statutory elements had they been different offenses -- were not two incidents of merely similar misconduct but the exact same singular instance of conduct. A proper Double Jeopardy analysis required reversal because the statutory elements and conduct were identical. United States v. Dixon, ____ U.S. ____, 113 S.Ct. 2849; 125 L.Ed.2d 556 (1993), (reinstating the Blockburger double jeopardy analysis). See, United States v. Blockburger, 284 U.S. 299 (1932). As the Eleventh Circuit itself has acknowledged in United States v. Adams, 1 F.3d 1566 (11th Cir. 1993) and United States v. Sanchez, 3 F.3d 366 (11th Cir. 1993), the statutory elements of the charged offenses are controlling, not the surplus language in the indictment not involving those statutory elements. Adams, at 1573. Drug quantity is not a statutory element and the jury in Fernandez was charged as such.

A single charge is not susceptible to improper subdivision. United States v. Flick, 716 F.2d 735 (9th Cir. 1983)(cited in United States v. Smith, 757 F.2d 1161, 1166 (11th Cir. 1985). The charges are in fact and in law the same. Language surplusage in the counts led to overcharging of offenses in a government effort to distinguish between a supposed attempted distribution and a distribution which was, in reality, the same conduct. The language injected confusion

regarding the required elements and allowed the jury to render two verdicts for one crime.

ARGUMENT AND CITATIONS OF AUTHORITY

I. THE JURY HAVING ACQUITTED THE DEFENDANT OF COUNT FOUR ENTITLES THE APPELLANT TO HAVE COUNT FIVE DISMISSED.

Counts IV and V share identical elements and arise from a single act and course of conduct. While one course of conduct may violate different statutes and result in multiple punishments, in this case it became obvious at the close of the government's case in chief that there was only one distribution that had been worded in the indictment as a 1,000 kilogram deal and then as a 500 kilogram deal. The jury returned a verdict of not guilty as to Count IV and guilty as to Count V. Count IV charged an attempted violation of 21 U.S.C. 841 (pursuant to 18 U.S.C 846) and Count V charged a violation of the same statute.[1] But, both counts relied on evidence of only one offense. This is not a question of overlapping elements of proof. United States v. Felix, ___ U.S. ___, 113 S.Ct. 1377 (1992). Neither is this a situation where there was proof of two separate crimes involving the same statute. Here, the government manipulated the charges so as to obtain multiple counts for what is in fact and law the same offense. Whalen v. United States, 445 U.S. 684, 691-92 (1980)(cited in United States v. Smith, 757 F.2d 1161, 1166 (11th Cir. 1985).

In North Carolina v. Pearce, 395 U.S. 711 (1979), this Court interpreted the Fifth Amendment to protect against a second prosecution for the same offense after acquittal, a second prosecution for the same offense after conviction, and multiple punishments for the same offense. The heart of the Double Jeopardy clause is the prohibition against multiple prosecutions for the same offense. Jeffers v. United States, 432 U.S. 137 (1977)(citing, Brown v. Ohio, 432

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[1]The indictment counts are reproduced at pp. xiii and xiv.

U.S. 161 (1977); United States v. Wilson, 420 U.S. 332 (1975); and Waller v. Florida, 397 U.S. 387 (1970)).

A. THE COUNTS

The appellant consistently objected that Counts IV and V charged the same crime using evidence for both counts of common conduct. (R20-1559, R6-1725-26). The appellant could not have been subsequently tried on either Count IV or Count V as each count is the same offense and relied on proof of the same conduct. Brown v. Ohio, 432 U.S. 161 (1977); Green v. United States, 355 U.S. 184, 187-88 (1957). The only difference between the indictment counts is that Count IV is worded in terms of an attempt and charges 1000 kilograms as the offense quantity while Count V is worded in terms of a completed offense and charges 500 kilograms.[2] The evidence adduced was the same, that the principals were engaged in negotiations for 1000 kilograms and that when the drivers got to Mobile there was only 500 kilograms to be picked up.

At the close of the government's case, defense counsel addressed the peculiar wording of the indictment Counts. The indictment alleged attempted importation and importation and attempted distribution and distribution, respectively. (R20-1532-65). In encapsulating the testimony, the attorneys noted that the two conspiracy counts turned around discussions between an agent, a confidential informant, Marino and others and their ability to transport the approximately 1,000 kilograms from Honduras into the United States. (R20-1532). All conversations after that point, he noted, centered on the delivery of the drugs in Mobile. (R20-1533-34). "The agreement that was reached was that a 1,000 kilos of cocaine would be supplied to Marino and Schwartz in Alabama." (R20-1534). The trial court expressed concern about the inclusion of the attempt count as a substantive count. (R20-1536).

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[2]See, pp. xiii and xiv for the exact wording of the counts.

Indeed, during the trial, the court had found the wording of the counts problematic. The court queried the government regarding the language:

> THE COURT: Ms. Bedwell, how do you respond to that? First of all, why was the indictment couched the way it was; the first one I've seen that way?
>
> MS. BEDWELL: I don't know why. That's just the amount of cocaine that was involved. That's what we expected the evidence to be along.
>
> THE COURT: The first question this jury's going to ask when they go back and deliberate is, do we have to find exactly a thousand kilos or exactly five hundred.

(R20- 1718-19).

Later, counsel for Fernandez repeated his objection to the inclusion of both counts and the following transpired:

> THE COURT: I'll be candid. This indictment is an unusual indictment the way it's framed and the way attempt and conspiracies are set out in separate counts. I'm just not sure I have seen one quite like it....

At the close of the government's case, the appellants had moved to dismiss Counts II and III. (R20-1543-48). The government, it was argued, had created a problem in the indictment by choosing to charge one conspiracy as two separate conspiracies. (R20-1544). There was no real legal difference between the redundant importation counts' semantic effort to distinguish an attempt from an accomplished crime and to charge specific differing amounts when the evidence was identical and the statute did not require it. The court granted a motion for judgment of acquittal as to the importation conspiracy counts (II and III), yet, it denied all of the other motions for judgment of acquittal. (R20-1605). It was error not to require the government to elect between Count IV or Count V since the two offenses are not separate and discrete offenses but are in fact and law the same offense. United States v. Universal Corp., 344 U.S. 218 (1952); United States v. Benefield, 874 F.2d 1503, 1505 (11th Cir. 1989); United States v. Marable, 578 F.2d 151, 153 (5th Cir. 1978).

Double Jeopardy Clause arguments often arise in the context of overlapping versus single or multiple conspiracies. Focus is often in the context of arguably different offenses arising out of the same act.[3] In United States v. Boldin, 772 F.2d 719, 729 (11th Cir. 1985), cert. denied, 475 U.S. 1048 (1986), the Eleventh Circuit adapted this Court's three-prong analysis to determine Congressional intent - look at the statutory language, decide whether the two offenses are sufficiently distinguishable, and look at the legislative language. citing Albernaz at 336-42. Statutory construction considerations of the legislature's intention to punish one act twice under two distinct statutes and/or the legal difference in the definitions of the offense is another area the courts are required to explore.[4]

But, that is not the situation here. The charged crimes were not different in time, place, participants, nor legal jurisdiction. Although the counts purport violations of two separate statutes, the appellant is in reality charged with the same statutory offense, distribution. In Albernaz, supra, the Supreme Court upheld a conviction where it was the intent of Congress to create two separate crimes out of the same course of conduct. A similar section 846 argument is not available in the instant case because, as discussed infra, Congress made "attempt" part of the definition of distribution and attempt is already a part of an 18 U.S.C. 841 violation.

In United States v. Gonzalez, 921 F.2d 1530, 1535 (11th Cir. 1991), the Eleventh Circuit noted that this Court had established a two-step analysis to determine whether successive prosecutions ran afoul of constitutional constraints. The first step is to determine whether Congress intended that each violation be a separate offense. Secondly, even if Congress intended separate offenses, it was still necessary to determine if the conduct was the "same offense" as defined within the

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[3]Ball v. United States, 470 U.S. 856 (1985); United States v. Woodward, 469 U.S. 105 (1985);Missouri v. Hunter, 459 U.S. 359 (1983); Albernaz v. United States, 450 U.S. 333 (1981).

[4]See, e.g., United States v. Chalan, 812 F.2d 1302, 1616-17 (10th Cir. 1987) (interpreting language contained in 18 U.S.C. 924(c) for purposes of Double Jeopardy.

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meaning of the Double Jeopardy clause. citing, United States v. Garrett, 471 U.S. 773, 778 (1985); and United States v. Garrett,727 F.2d 1003 (11th Cir. 1984)(ruling below). "The gist of the crime of conspiracy, and the characteristic which defines its breadth, is the unlawful agreement....At its core, the determination as to whether the government can prosecute a defendant for more than one conspiracy turns on whether there exists more than one unlawful agreement." United States v. Benefield, 874 F.2d 1503, 1505 (11th Cir. 1989)(citing, United States v. Marable, 578 F.2d 151, 153 (5th Cir. 1978).

C. MULTIPLICITY

The government contended on appeal that its indictment error was simply one of multiplicity and that Fernandez somehow waived objection. Counts IV and V on their face appeared to allege different offenses. When it became apparent that only a single course of conduct was proven, Fernandez promptly moved for a judgment of acquittal to which he was entitled.

Multiplicity is another facet of Double Jeopardy Clause analysis. A pleading rule that decries the charging of a single offense in more than one count of an indictment, generally, the test for determining whether an indictment is multiplicitous is whether each count "requires proof of an additional fact which the other does not." United States v. Fiallo-Jacome, 784 F.2d 1064 (11th Cir. 1986) (quoting Blockburger v. United States, 284 U.S. 299, 304 (1932); United States v. Anderson, 872 F.2d 1508, 1520 (11th Cir. 1989); United States v. Vaughn, 859 F.2d 863 (11th Cir. 1988), cert. denied, 490 U.S. 1065, 109 S.Ct. 2064 (1989); Ward v. United States, 694 F.2d 654, 661 (11th Cir. 1983). There does not, however, appear to be any bright line between the cases that discuss counts in straight

Double Jeopardy terms and those that discuss multiplicity. Indeed, they are often discussed alternatively.[5]

Like regular Double Jeopardy analysis the sin of multiplicity is that it allows the government "the advantage of offering a jury a choice - a situation which is apt to induce a doubtful jury to find the defendant guilty...rather than continue to debate his innocence. Ball v. United States, 470 U.S. 856, 868 (1985)(quoting Cichos v. Indiana, 385 U.S. 76, 81 (1966)(Fortas, J., dissenting from dismissal of certiorari); United States v. Reed, 639 F.2d 896, 904 (2d Cir. 1981); United States v. Hearod, 499 F.2d 1003 (5th Cir. 1974)(danger of a multiplicitous indictment is that it creates the possibility that a defendant may receive multiple punishments for the same offense); Reed, 639 F.2d at 904; Hearod, at 1005, (may improperly prejudice a jury by suggesting that defendant committed not one but several crimes); United States v. Dixon, 921 F.2d 194, 196 (8th Cir. 1990)(may suggest to the jury that the defendant committed more than one crime).

It is apparent that the sin of the redundant counts is that they gave the government more than "one bite" at the appellant. As is discussed infra, when coupled with the court's instructions to the jury regarding the proper application of the law, this caused him to be tried twice for the same offense. This is especially so given the fact that the jury was deadlocked. The court gave an "Allen charge". The giving of two counts charging criminal responsibility for the same conduct, in combination with the Allen charge gave the government an unfair advantage.

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[5]See, e.g., United States v. Moody, 923 F.2d 341, 346 (5th Cir. 1991); but see, United States v. De La Torre, 634 F.2d 792, 795 (5th Cir. 1981) (indictment technically sound and not multiplicitous) See also, United States v. Thompson, 624 F.2d 740, 742 (5th Cir. 1980).United States v. Free, 574 F.2d 1221 (5th Cir.), cert. denied, 439 U.S. 873 (1978) (violation of two separate statutes not multiplicity).

D. "SAME OFFENSE"

"Same offense" has been defined in the context of an act constituting a violation of two distinct statutory provisions. Blockburger v. United States, 284 U.S. 299 (1932). See, Johnson v. Howard, 963 F.2d 342 (11th Cir. 1992)(two separate offenses arising out of one incident are the same "unless each requires proof of an additional fact which the other does not.")(citing, Blockburger at 304; Beverly v. Jones, 854 F.2d 412 (11th Cir. 1988). This test is based on the requirements of proof, not on the actual evidence adduced at trial. Hattaway v. United States, 399 F.2d 431, 432 (5th Cir. 1968). Under the Blockburger rule a greater and lesser included offense are classified as the same, for only one requires allegation of an element not contained in the other. Brown at 168-69. Even in a Blockburger situation if the two offenses have no overlapping elements they could be the same offense for double jeopardy purposes if the prosecution relied on the same evidence or theory for both. Illinois v. Vitale, 447 U.S. 410 (1980). Chief Justice Burger noted that "[o]ur cases, particularly Vitale and Brown, require the courts to look to the statutory elements...not to the similarities of facts in the government's proof." Illinois v. Zegart, 452 U.S. 948 (1981) (Also citing, Iannelli v. United States, 420 U.S. 770, 785 n. 17 (1975).

E. Distribution

"Distribution" is defined as a delivery or an "actual, constructive, or attempted transfer" by 21 U.S.C. 802(8) and (11).[6] The definition of distribution, then, already includes an attempt and is broad enough to include acts that traditionally would have been defined as aiding and abetting. United States v. Oquendo, 505 F.2d 1307 (5th Cir. 1975). The court instructed the jury that it was unnecessary for them to distinguish between an attempt and an accomplished offense and the jury is presumed to have followed his instructions.

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[6]See page xii and xiii.

F. "Attempt"

In rebutting the appellants' motions for acquittal, the government's position concerning the issue of an "attempt" as being different from a completed crime was that "all that is necessary for the government to prove an attempt is that the defendants engaged in a substantial step toward the commission of the substantive offense...." (R6-1536). In United States v. CEA, 914 F.2d 881, 887 (7th Cir. 1990), the court upheld an 841 attempt conviction on those grounds. (citing, United States v. Rovetuso, 768 F.2d 809, 821 (7th Cir. 1985) cert. denied, 476 U.S. 1106 (1986)). The court's instruction to the jury mirrored the one suggested by the government. (R22-2102-04).[7]

The jury must be presumed to have acted on the court's instructions regarding "attempt" - that they could "convict the defendant of [attempting to] commit the crime even if the evidence shows that the offense was completed." (R22-2104) Count V, then, applied to an attempt as well as to a completed crime. Likewise, count IV also reads as a matter of law "possesses or attempts to possess."[8]

G. Quantity

The only thing distinguishing the two counts was quantity and quantity is not a statutory element. During the charge conference the government cited a host of cases for its position that "the amount of controlled substance is not an element of the offense and is now [sic] relevant only as to sentencing." (R6- 1715). During the trial the government had cited United States v. Williams, 876 F.2d 1521 (11th Cir. 1989) as support for the government's position that "the nature and quantity of the controlled substance is relevant only to sentencing

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[7]See pp. xiv and xv for the exact wording of the jury charge.

[8]On appeal, the government argued, without citation to authority, that the two offenses, attempt to possess and the substantive possession counts, have different elements. (Appellee's Brief at 103).

and is not an element of the offense." (R20-1540). The prosecutor told the jury this in her closing:

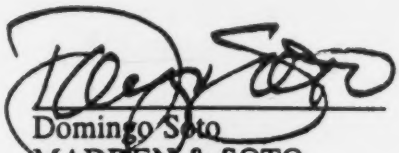
> MS. BEDWELL:The amount of cocaine that was charged in the indictment is simply not an element of the offense. The amount of cocaine is relevant only for a determination of what the object of the conspiracy was. You will not hear the judge say that the government is required to prove beyond a reasonable doubt any particular amount of cocaine because that is simply not the law. (R21- 2073).

That position is consistent with case law. United States v. Christopher, 923 F.2d 1545 (11th Cir. 1991); See also, United States v. Wood, 834 F.2d 1382 (8th Cir. 1987). In determining which facts must be proven beyond a reasonable doubt, the legislature's definition of the elements of the offense controls. McMillan v. Pennsylvania, 477 U.S. 79, 85 (1986). "Thus the prosecution is only required to prove beyond a reasonable doubt 'all of the elements included in the definition of the offense of which the defendant is charged.'" Id., quoting Patterson v. New York, 432 U.S. 197, 210 (1977). Since it could consider any amount for either offense, what amount did the jury consider? The appellants sought to ameliorate the problem by providing special interrogatories but this was denied by the court. (R6-1717). Given the law and the facts, the jury charges and the prosecution's argument, then, the jury was faced with two identical charges for one offense and this was a violation of the Fifth Amendment. Because he was acquitted of one of those counts, the remaining count should be rendered.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari and remand the cause to the United States Court of Appeals for the Eleventh Circuit with instructions that the court reverse his conviction.

Respectfully submitted,



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I hereby certify that I have on this 13th day of January, 1995, served a true and correct copy of the foregoing document by first-class mail, postage prepaid, properly addressed on:

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APPENDIX A

U.S. V. DIAZ

UNITED STATES of America,
Plaintiff-Appellee,

v.

Oscar DIAZ;
Jose Manuel Ruiz;
Jesus Manuel Fernandez;
Al Pastor;
Billy Allen, a/k/a William Holster Allen;
Dudson Woods;
Daniel Lee Deatherage;
Kelly Fred Kalinowski;
Irving Schwartz;
Ramon Rodriguez, Jr.;
Robert Lincoln Fowler;
Joseph Thomas Marino; and,
Samuel J. Degiso,
Defendants-Appellants.

No. 90-7890

United States Court of Appeals
Eleventh Circuit.

July 29, 1994.

Appeal from the United States District Court for the Southern District of Alabama.

Before EDMONDSON, Circuit Judge, JOHNSON, Senior Circuit Judge, and PITTMAN*, Senior District Judge.

JOHNSON, Senior Circuit Judge:

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*Honorable Virgil Pittman, Senior U.S. District Judge for the Southern District of Alabama, sitting by designation.

Defendant-appellant Oscar Diaz and twelve defendants ("Appellants")[1] appeal various aspects of their convictions and sentences arising out of their participation in a cocaine importation and distribution conspiracy. After due consideration, we affirm Appellants' convictions and sentences.

I. STATEMENT OF THE CASE

A. *Background Facts*

1. The drug deal

On March 7, 1990, informant Ellis McKenzie informed Customs Agent Lawrence Winberg that appellant Billy Allen and others were involved with narcotics. McKenzie gave Agent Winberg Allen's telephone number. Winberg then contacted Allen, identifying himself as a Colombian drug dealer. As a result of these conversations and ensuing negotiations, Winberg and other undercover agents went to Miami, Florida, to meet with Allen and some of his fellow conspirators.

On March 25, 1990, Agent Winberg, Agent James Tanner, and McKenzie met with Allen and appellant Dudson Woods at the Sofitel Hotel to discuss their cocaine deal. Agent Tanner testified that he overheard a conversation between Allen and McKenzie in which Allen mentioned a previous cocaine trip to Honduras and stated how rich they would become at the conclusion of the drug transaction. The next day Allen introduced Agent Tanner and Agent Kyle Barnette to appellant Joseph Marino. Later that day, Winberg, Barnette, and Tanner met with Fabio DeChristofaro and appellants Samuel Degiso, Irving Schwartz, Allen, Woods, and Marino. At this meeting, videotaped by the government, Schwartz told Winberg that he could transport the cocaine using a specially prepared airplane. Agent Winberg stated that he would supply his own transportation, whereupon Schwartz offered to buy 1,000 kilograms of cocaine for $10,000 - $12,000 per kilogram. They agreed that Schwartz would pay $250,000 "earnest money" in the United States.

At a videotaped meeting on March 27, 1990, attended by Winberg, Tanner, Barnette, McKenzie, Schwartz, Marino, Andy

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[1]The other appellants are Jose Manuel Ruiz, Jesus Manuel Fernandez, Al Pastor, Billy Allen, Dudson Woods, Daniel Lee Deatherage, Kelly Fred Kalinowski, Irving Schwartz, Ramon Rodriguez, Jr., Robert Lincoln Fowler, Joseph Thomas Marino, and Samuel J. Degiso.

Schell, and Larry Feder, Schwartz stated that he wanted a long-term deal. Following the meeting, surveillance units photographed Marino, Schwartz, Feder, and Schell talking in the parking lot. These units later photographed Marino meeting with appellant Dan Deatherage. Winberg subsequently informed Allen and Woods about the meeting and told them that he would go to Honduras to work out the deal in early April.

In early April of 1990, Agents Winberg and Barnette met Schwartz at a Hilton Hotel in Pensacola, Florida to discuss the logistics of the cocaine deal. Schwartz told them that: (1) the cocaine would be sold in the Northeast; (2) he had a good organization; and (3) his people were "prepared to die." Subsequently, it was arranged for Agent Winberg to meet with Schwartz and Marino in Mobile, Alabama to receive the $250,000 earnest money. The parties agreed that Schwartz or Marino would remain with Winberg until payment of the balance on the cocaine.

On April 10, 1990, the Customs Service in New Orleans, Louisiana detained McKenzie as he tried to enter the United States from Honduras. Customs agents stopped McKenzie because he had crack cocaine on his person. Winberg went to New Orleans and met with McKenzie, who was released.

On April 14, 1990, Marino called Winberg to tell him he was at a hotel in Baldwin County, Alabama. Two days later, Winberg and Barnette met with Schwartz at the hotel to receive the earnest money. Feder, Marino, and Deatherage were also present.

On April 17, Agents Winberg, Barnette, and Mike Ciaurro met Schwartz to discuss delivering the cocaine in Baldwin County, Alabama. Because Schwartz told the agents that he wanted to see the cocaine, Winberg and Ciaurro accompanied Deatherage to view the cocaine.[2] When shown the cocaine, Deatherage snorted some. The delivery was then set for the next day.

In the morning of April 18, 1990, Marino met with Agents Winberg, Barnette and Ciaurro, telling them that Schwartz and Deatherage had gone to meet the drivers. Barnette then left to prepare the delivery site. Marino also told the agents that (1) he, Schwartz, Schell, and Feder put up the money for the cocaine and (2) that Mannie (appellant Jose Manuel Ruiz) was in charge of transportation.

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[2]The cocaine was not actually from Honduras but was instead from the government's supply of previously confiscated cocaine.

Marino then offered to stay in Alabama until the balance of the money was paid.

As arranged, Schwartz, Deatherage, and Agents Barnette and Tanner rendezvoused with the drivers. At the rendezvous site, Schwartz told the agents that he would be using two trucks and a Nissan automobile to transport the drugs - each truck would hold 250 kilograms with the Nissan carrying sixty kilograms in a secret compartment. Schwartz introduced appellants Deatherage and Kelly Kalinowski as "his guys." He then instructed everybody to go to the loading site, a barn in Baldwin County, while he returned to the hotel. At the loading site, Agent Keith Barnette observed appellants Oscar Diaz and Jesus Fernandez working as part of Schwartz's loading and transportation crew. Diaz told Keith Barnette that the cocaine would be hidden in the truck's sleeper compartment. As the cocaine was being loaded, several agents[3] observed Deatherage and Ruiz counting the bags. Agent Tanner overheard Ruiz telling Deatherage to verify the count because any shortfall would come out of their pockets. Assisting in the unloading were appellants Degiso, Kalinowski, Fernandez, Ramon Rodriguez, and Al Pastor. Agents observed Diaz loading the sleeper compartment and overheard a conversation between him and Rodriguez in which each thought that the other had been counting. Ruiz was then heard telling them that they were partners and had better get it straight. Diaz then began using a calculator.

Meanwhile, appellant Robert Fowler asked one of the agents if he could cover the floor because he was going to open the Nissan's secret compartment beneath the vehicle and did not want to get dirty. As Fowler got under the Nissan, he told agents that it would hold sixty kilograms. Fowler also told agents that he did not know how to open the compartment because he had never before used it. Fowler asked for various tools, but Fernandez told him that none were available.

One the cocaine was loaded, the men were arrested. Schwartz and Marino were arrested at their hotel. Woods and Allen were arrested in Miami on April 22, 1990. In a post-arrest statement, Woods admitted working for Feder and telling Feder that he could obtain cocaine from McKenzie.

2. Schell's testimony

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[3]A number of agents were in the barn, pretending to be part of Winberg's Colombian drug gang.

Andy Schell testified for the government. He identified "Mannie" as appellant Manuel Ruiz and admitted being involved in the drug business with Schwartz, Marino, and Ruiz. Schell testified that after meeting Schwartz and Marino, he began buying cocaine from Schwartz, Marino, and Deatherage and that Feder later became involved. Schell also testified that, at Schwartz's request, he raised $70,000 for the deal with Agent Winberg. Schell identified Deatherage, Woods, and Allen as Schwartz's partners.

B. *Procedural History*

On April 19, 1990, Marino, Schwartz, Deatherage, Degiso, Ruiz, Diaz, Rodriguez, Pastor, Kalinowski, Fowler, and Fernandez were indicted in a five-count indictment charging them with (I) conspiracy to possess with intent to distribute cocaine, (II) attempt to import cocaine, (III) conspiracy to import cocaine, (IV) attempt to possess cocaine with intent to distribute, and (V) possession of cocaine with intent to distribute. A separate but identical indictment was issued against Allen and Woods. The two cases were then consolidated.

The trial began September 19, 1990 and lasted approximately two and one-half weeks. During the trial, the court granted judgment of acquittal motions in favor of Diaz, Fernandez, Pastor, Kalinowski, Rodriguez, and Fowler on Counts II and III. Following the giving of an *Allen* charge, Marino, Schwartz, Degiso, Allen, Deatherage, Woods, and Ruiz were convicted of Counts I, III, and V and found not guilty on Counts II and IV. In addition, Diaz, Fernandez, Pastor, Kalinowski, Rodriguez, and Fowler were convicted on Count V and acquitted on Counts I and IV. Appellants were sentenced to lengthy prison terms.

II. ANALYSIS

Among them, Appellants raise multiple issues concerning alleged errors at trial and sentencing.[4] We address below only those issues having merit, specifically whether: (1) the district court abused its discretion in restricting cross-examination of Agent Keith Barnette or informant McKenzie; (2) the prosecutor impermissibly injected race into the trial; (3) the prosecutor struck a venireperson based on race; (4) the court erred in admitting post-arrest statements of Fowler; and

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[4]We note that not all Appellants join in each claim. Nonetheless for the sake of convenience, we will refer to Appellants when discussing each claim.

(5) Appellants' sentences violate either the Ex Post Facto Clause or the Eighth Amendment.[5]

A. Limitations on Cross-Examination

1. Agent Barnette

[1] Shortly after Appellants were arrested, Agent Keith Barnette was arrested and charged by Alabama authorities with vehicular homicide committed while on duty.[6] At trial, Appellants sought to question Barnette regarding the arrest and discrepancies between his testimony and his rough notes, prepared one week after the arrest. Appellants proffered that they would impeach Barnette by showing that he had changed his testimony as a result of the arrest in the hopes of receiving leniency in his pending criminal case and/or assistance in any civil actions against him. However, the government filed a motion in limine to prevent defense counsel from examining Barnette concerning the vehicular homicide action. In granting the government's motion, the district court held that so long as Barnette's testimony was consistent with his rough notes, which had previously been turned over to Appellants, Appellants could not question Barnette about the accident or pending action against him.

On direct examination, Barnette testified that Diaz had spoken to him regarding the "count" on the cocaine and had used a calculator to add the cocaine packages. On cross-examination, Barnette admitted that his notes did not reflect the conversation or Diaz's use of a calculator. Appellants then asked Barnette whether there had "been new developments in your life that might cause you to want to curry favor with the United States Government prosecutors and customs agents and other law enforcement agents in this case." Barnette answered in the negative. Asked the same question a second time by

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[5]Having carefully studied the record, we find that *all* other issues raised by Appellants are without merit. According, further discussion is not warranted with regard to Appellants' claims concerning (1) various acts of alleged prosecutorial misconduct, (2) suppression motions, (3) the completeness of the trial transcript, (4) double jeopardy, (5) peremptory challenges, (6) the admission of Deatherage's other crimes and certain statements made by Marino, (7) the *Allen* charge, (8) violations of the Jencks Act, (9) the sufficiency of the evidence, and (10) Winberg's cross-examination.

[6]At the time that Barnette testified, he performed only administrative duties pending the results of an internal affairs investigation. A civil action was also instituted against him.

the court, Barnette again denied having any reason to "curry favor". Appellants then moved to pursue further this line of questioning, which was denied.

Appellants next asked whether Barnette was under investigation by the Internal Affairs of the Customs Service and no longer on active duty. The court sustained the government's objections before Barnette answered either question. However, Barnette did answer "yes" in response to Appellants' question if he would lose his job if he committed perjury. On redirect, Barnette testified that the day after Appellants' arrest and prior to creating his notes, he told the U.S. Attorney's Office about the conversation with Diaz and about Diaz's use of a calculator. After the government concluded its case in chief, defense counsel recalled the witness and attempted to establish its proffer. As before, Barnette denied being biased or motivated on behalf of the government. Consequently, the court maintained its prior ruling prohibiting examination into the vehicular homicide action. On appeal, Appellants claim - that restricting Barnette's cross-examination was error. We disagree.

[2-4] Although the district court possesses discretionary power to rule on the admissibility of evidence, *United States v. Garcia*, 13 F.3d 1464, 1468 (11th Cir.), *cert denied*, ____ U.S. ____, ____ S.Ct. ____, ____ L.Ed.2d. ____ (1994), its discretion in limiting the scope of cross-examination is subject to requirements of the Sixth Amendment. Id. *United States v. Lankford*, 955 F.2d 1545, 1548 (11th Cir. 1992).[7] The right to cross-examine is not unlimited, however, because once there is sufficient cross-examination to satisfy the Confrontation Clause, further questioning is within the district court's discretion. *United States v. Taylor*, 17 F.3d 333, 340-41 (11th Cir. 1994). "The test for the Confrontation Clause is whether a reasonable jury would have received a significantly different impression of the witness' credibility had counsel pursued the proposed line of cross-examination." *Id.* (quoting Garcia, 13 F.3d at 1469).

[5] Appellants wished to question Barnette about the state court indictment, hypothesizing that it gave him motive to testify favorably for the government in the hopes that he would receive leniency or assistance as to the homicide action. Appellants rely on *Greene v. Wainwright*, 634 F.2d 272, 275-76 (5th Cir. 1981) for the proposition that because they were attempting to show bias on the part

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[7]The Confrontation Clause of the Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him." U.S.Const., sixth amend.

of a prosecution witness, Barnette, the limitation on cross-examination was unconstitutional. Nonetheless, the mere fact that Appellants sought to explore bias on the part of a prosecution witness does not automatically void the court's ability to limit cross-examination. It is axiomatic that the right to cross-examination is not absolute because "the information sought to be elicited must be relevant." *Haber v. Wainwright*, 756 F.2d 1520, 1522 (11th Cir. 1985).

Here, Barnette's testimony was consistent with statements given prior to both the creation of his notes and his arrest. Barnette's testimony simply parroted statements made at a time when he had no special incentive to seek the government's help. Because of the highly prejudicial nature of the arrest, the court properly handled the cross-examination by limiting inquiry into the accident as long as Barnette's testimony did not deviate from his notes and prior statements. The fact that his testimony was entirely consistent with these prior statements demonstrates that Barnette was not shading his testimony in an effort to gain leniency on his state court case. Moreover, we note that there is no evidence in the record showing that the government had the ability to grant leniency in Barnette's Alabama action.[8] In light of these circumstances, we fail to see how the limitation on cross-examination constituted an abuse of discretion or violated the Sixth Amendment. *See United States v. Thorn*, 917 F.2d 170, 176 (5th Cir. 1990) (barring defendant from exploring government witness' state law indictment did not violate Sixth Amendment as there was no evidence the government could influence the state court proceedings, and the existence of a pending state court indictment on charges totally unrelated to the testimony offered in the case did not give the witness a substantial reason to cooperate with the government). Finally, Appellants were able to delve into Barnette's credibility, albeit in a limited fashion, by inquiring if he had any reason to "curry favor" with the government. Thus, the district court did not abuse its discretion by limiting Appellants' cross-examination of Barnette.

2. Informant Ellis McKenzie

At trial, the government declined to call McKenzie as a witness. Instead, Appellants introduced McKenzie's testimony via a pretrial deposition. Appellants planned to use the deposition to show

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[8]Appellants' reliance on *Lankford* is misplaced inasmuch as *Lankford* involved a witness' possible motive to cooperate with the government in order to (1) "protect his sons," (2) "obtain federal assistance in avoiding a subsequent federal prosecution against them," and (3) "solicit help [from the] federal government in his sons' state case." 955 F.2d at 1549. The facts in this case are substantially different.

that Winberg lied in stating that he had not intervened or assisted McKenzie when McKenzie was detained for possession of crack cocaine in New Orleans. Additionally, Appellants sought to demonstrate that McKenzie might be biased in favor of the government to prevent criminal charges being brought concerning the New Orleans crack incident. The district court refused to allow Appellants to introduce the entire deposition, allowing only those portions that it deemed relevant for impeachment purposes. Thus, Appellants were prohibited from introducing McKenzie's testimony about his detention in New Orleans. However, the court did permit Appellants to introduce portions of the transcript in which McKenzie admitted being a paid government informant. Appellants claim that the court's limitation violated their Sixth Amendment confrontation rights and constituted reversible error. We disagree.

[6] The court did not err by refusing to allow Appellants to enter either those portions of McKenzie's deposition involving the New Orleans incident or the deposition *in toto*. *See United States v. Thompson*, 976 F.2d 666, 671 (11th Cir. 1992) (introduction of complete medical records unwarranted where they were not as a whole probative of witness' credibility; only those portions inconsistent with witness' trial testimony were probative and could be used for impeachment), *cert denied*, ____ U.S. ____, 113 S.Ct. 3010, 125 L.Ed.2d 701 (1993). Furthermore, a review of the record demonstrates no significant inconsistencies between Winberg's and McKenzie's description of the New Orleans crack incident. Accordingly, the district court did not err in limiting the impeachment uses of McKenzie's deposition.

[7, 8] We find that the Appellants' Sixth Amendment claims similarly lack substance. Although Appellants wanted to probe deeply into McKenzie's background, the Sixth Amendment is satisfied where sufficient information is elicited to allow the jury to gauge adequately a witness' credibility and to assess his motives or possible bias. *United States v. Burke*, 738 F.2d 1225, 1227-28 (11th Cir. 1984) (sufficient information elicited where jury knows a witness has been granted immunity, participated in the witness protection program, and received money from the government). For example, in *United States v. Kopituk*, we held that a court does not abuse its discretion by limiting cross-examination of the government's "most vital" witness where the jury knows that the witness has an agreement with the government to testify in exchange for a lenient plea arrangement on pending charges. 690 F.2d 1289, 1337 (11th Cir. 1982) *cert. denied*, 461 U.S. 928, 103 S.Ct. 2089, 2090, 77 L.Ed.2d 300 (1983).

Here, analogous information was presented to the jury. McKenzie, who can in no way be termed a "vital witness" admitted that he was a government informant, that he had been paid money in the past, and that he had received $12,000 in this case. He also testified that he had received $2,000 the day before his deposition and that he spent time preparing for his deposition in the company of Agents Kyle Barnette and Dwight McDaniel. The jury also knew that McKenzie stood to receive $250,000, representing the maximum award allowed to informants. Finally, the jury was aware that whether McKenzie actually received the $250,000 would be determined by Winberg's superiors. Under these circumstances, no further bias would have been exposed by investigation into McKenzie's character or the events surrounding his New Orleans detention. *United States v. Alonso*, 740 F.2d 862, 874 (11th Cir. 1984) (court properly prohibited inquiry into facts concerning witness' arrest; defendants were allowed to ask if witness made a deal with government or expected a benefit for testifying), *cert. denied*, 469 U.S. 1166, 105 S.Ct. 928, 83 L.Ed.2d 939 (1985).[9]

B. Racial Comments

[9] Appellants claim that the prosecutor impermissibly injected race into the case during the redirect of Schell wherein the following exchange occurred:

PROSECUTOR: You responded to some questions related to pressure from Mr. Schwartz and Mr. Marino about money that was owed, do you recall those questions?

SHELL: Yes.

PROSECUTOR: What type of pressure, if any, was applied to you for collection for money?

SCHELL: Mr. Marino, not Mr. Schwartz. He had told me that I couldn't control Struder and that the only way to control him was to take a bat to him. He used other words but that was the jist [sic] of it.

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[9]Given the overwhelming evidence presented against each appellant, even if we were to conclude that McKenzie's cross-examination had erroneously been limited, the error would have been harmless. *See Grizzell v. Wainwright*, 692 F.2d 722, 726 (11th Cir. 1982) (no "reasonable probability" that verdict was affected by the error), *cert. denied*, 461 U.S. 948, 103 S.Ct. 2129, 77 L.Ed.2d 1307 (1983).

DEFENSE COUNSEL: I object to the conclusion of remarks as to what he considers the jist [sic] of something said to him and ask that last statement be stricken.

THE COURT: I am not sure I understand your last answer, without giving any undue....

SCHELL: Okay. Struder - he told me that he wanted to go to Struder's house and that *the only way to control a nigger was to beat him with a bat.*

THE COURT: Overrule your objection.

PROSECUTOR: Were those Mr. Marino's exact words?

SCHELL: Yes.

PROSECUTOR: *Is Mr. Struder a black man?*

DEFENSE COUNSEL: Judge, I object. That is absolutely immaterial and irrelevant in regard to this.

THE COURT: Overruled.

(emphasis supplied).

Schell did not answer the prosecutor's question as the prosecution immediately moved onto other points. At a bench conference following this examination, Appellants moved for a mistrial, alleging that the government was attempting to inflame the black jurors against the white Appellants. The district court denied the motion. Appellants declined the court's offer to give a curative instruction.

While this Court is ever-vigilant regarding the improper injection of race into criminal trials, the prosecutor's statements do not constitute an improper appeal to race. Thus, we do not believe that a mistrial was warranted. *See Willis v. Kemp*, 838 F.2d 1510, 1522-23 (11th Cir. 1988) (although improper, prosecutor's question of black defendant as to whether he referred to his white victim as a "honkey was not grounds for granting a mistrial), *cert. denied*, 489 U.S. 1059, 109 S.Ct. 1328, 103 L.Ed.2d 596 (1989); *United States v. Krohn*, 573 F.2d 1382, 1389 (10th Cir.) (government's eliciting from a witness that one of two white defendants on trial for mail fraud had referred to a victim of their scheme as a "poor black bastard" was not an appeal to racial prejudice), *cert. denied*, 436 U.S. 949, 98 S.Ct. 2857, 56

L.Ed.2d 792 (1978). *See also United States v. Hernandez*, 865 F.2d 925, 927-28 (7th Cir. 1989) (prosecutor's improper closing remark to "send clear message to Cuban drug dealers" was not so inflammatory as to prejudice Cuban defendant).

C. Strike of Venireperson

At trial, the prosecutor exercised peremptory strikes to remove three black persons from the jury. Appellants assert that one of these challenges, that of venireperson Portis, violated the Constitution's equal protection guarantee because it was racially motivated. *See Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). Without finding that Appellants had established a prima facie case of discrimination, the district court asked the prosecutor to articulate reasons underpinning the strikes. The prosecutor responded that she struck Portis because (1) she believed that Portis may have been related to a defendant whom she had formerly prosecuted and (2) Portis was generally inattentive during the voir dire, focusing on the defense table during jury selection. The court upheld the strike of Portis.

[10-12] We give great deference to district court's finding that the government rebutted a prima facie case of discriminatory jury selection and reverse only if that finding is clearly erroneous. *United States v. Cure*, 996 F.2d 1136, 1138 (11th Cir. 1993), *cert. denied*, ____ U.S. ____, 114 S.Ct. 1075, 127 L.Ed.2d. 393 (1994). given that the court asked the prosecutor to explain her strikes of the black venirepersons, we shall assume that Appellants met the requirements of a prima facie case and therefore proceed directly to determining whether the prosecutor's reasons for striking Portis were race-neutral. The prosecutor's belief that venireperson may have been related to a defendant in an earlier case did not justify the challenge. The record suggests that the venireperson was unrelated to that defendant as Portis did not affirmatively respond to the court's inquiry to the venire whether a family member had ever been involved in a criminal matter in court. Nonetheless, the venireperson's inability to pay attention is a proper race-neutral reason for using a peremptory strike. *See United States v. Hendrieth*, 922 F.2d 748, 749-50 (11th Cir. 1991)(per curiam) (upholding trial court's decision to allow a strike based upon a juror's inattentiveness and her rolling and rubbing her eyes during voir dire).

[13] Explanations based upon a juror's demeanor are, however, difficult to confirm on appeal because the transcripts that comprise the record before the court do not portray the unacceptable behavior. Moreover, such explanations are particularly susceptible to

the kind of abuse prohibited by *Batson*. Consequently, to allow meaningful appellate review, trial judges should fully develop the record regarding the specific behavior by a venireperson that leads to a peremptory strike and should verify that the stricken venireperson's conduct was conspicuously different from that of the other venirepersons. *See United States v. Cooper*, 19 F.3d 1154, 1161 (7th Cir. 1994) (upholding demeanor-based strikes in part because trial judge noted on record that, based on his own observations, the prosecutor's interpretations were reasonable); Michael J. Raphael & Edward J. Ungvarsky, *Excuses, Excuses: Neutral Explanations Under Batson v. Kentucky*, 27 U.Mich.J.L.Ref. 229, 246-50, 266-67 (1993) (arguing that courts should reject demeanor-based explanations that cannot be confirmed by the record).

[14] In this case, Appellants do not dispute that Portis directed her attention toward the defendants, away from the prosecutors, during jury selection, allowing us to infer that Portis' behavior was different from other venirepersons. *Cf. Cure*, 996 F.2d at 1138-39 (defense counsel's failure to offer contrary description of venireperson's demeanor militates against reversal). Accordingly, the district court did not clearly err by finding that the prosecutor offered a race-neutral reason for striking Portis from the jury.

D. Robert Fowler's post-arrest statement

Following the receipt of his *Miranda* rights at the barn, Fowler was asked if he wanted to waive his rights. He responded by shaking his head. He was then taken to jail. Some four hours after his arrival, agents brought him to an interview room where Agent McDaniel told Fowler the charges against him and that he would be tried in Alabama. Agent McDaniel then asked other agents present in the interview room if Fowler had been "Mirandized." The agents responded that he had been. Thinking that Fowler might not understand the term "Mirandized," McDaniel notified Fowler that he had a right to an attorney and a right not to speak to the agents. Fowler acknowledged that he was aware of his *Miranda* rights. McDaniel then asked him if he wished to cooperate. At trial, McDaniel testified that Fowler responded by saying that he could not cooperate, he did not know anything or anybody, he was paid to be "blank," and he was simply a chauffeur driving someone from Miami. McDaniel further testified that when he questioned Fowler about $500 that Fowler possessed when arrested, Fowler stated that he would rather not say who paid him and that he was sorry he had gotten greedy. Fowler then asked for an attorney and questioning ceased. The court denied Fowler's motion to suppress these statements.

[15] On appeal, Fowler contends that the denial of his suppression motion was error because he had unequivocally invoked his *Miranda* rights. Assuming, without deciding, that Fowler is correct, the taking of his statements in contravention of *Miranda* is subject to the harmless error analysis. *United States v. Beale*, 921 F.2d 1412, 1435 (11th Cir.), *cert. denied*, ____ U.S. ____, 112 S.Ct. 100, 116 L.Ed.2d 71 (1991); *United States v. Pena*, 897 F.2d 1075, 1082 (11th Cir. 1990). Our inquiry is two-fold. First, we examine the effect the erroneously admitted statement had upon other evidence introduced at trial and upon the conduct of the defense. *Beale*, 921 F.2d at 1435. Second, if, absent the illegal statement, the remaining evidence is so overwhelming to establish guilt beyond a reasonable doubt, admission of the statement is harmless. *Id.*

[16] At trial, Agent Tanner testified that Schwartz told him that a Nissan automobile with a secret compartment in its underbelly capable of storing sixty kilograms of cocaine would be one of the vehicles used to load and transport the drugs. The government introduced photographs showing the Nissan's secret compartment at trial. It is uncontroverted that Fowler was present at the barn and that he spent much time there under the Nissan. Agents Lamplaugh, Tanner, and Keith Barnette testified that at the barn Fowler expressly told them that he was attempting to open the Nissan's hidden compartment. Agents Lamplaugh and Tanner also testified that they overheard Fowler telling other appellants that he needed tools and a flashlight to open the compartment. Additionally, Agent Lamplaugh testified that Fowler told him that the compartment held sixty kilograms of cocaine. Given the overwhelming strength of this evidence, we conclude that the admission of Fowler's post-arrest statements was harmless error.

E. Sentencing Issues

1. Ex Post Facto Violation

[17] to avoid ex post facto problems, we have held that a defendant is to be sentenced under the Guidelines and commentary in effect on the date of sentencing unless a more lenient punishment would occur under the Guidelines' version in effect on the date the offense was committed. *United States v. Wilson*, 993 F.2d 214, 216 (11th Cir. 1993). Furthermore, Guideline commentary is authoritative unless its interpretation violates the law or is an erroneous reading of the Guidelines. *Stinson v. United States*, ____ U.S. ____, _____, 113 S.Ct. 1913, 1915 123 L.Ed.2d 598 (1993).

[18] Ruiz claims that an ex post facto violation occurred when the district court refused to give him an acceptance of responsibility reduction based on commentary that took effect *after* he was convicted but *before* he was sentenced. Although "application of an intervening Guideline interpretation by commentary promulgated after the offense could run afoul of the Ex Post Facto Clause," *United States v. Carroll*, 6 F.3d 735, 746 n.9 (11th Cir. 1993), *cert. denied*, ____ U.S. ____, 114 S.Ct. 1234, 127 L.Ed.2d 577 (1994). We are not confronted with such a situation. Where, as here, the amendments do not overrule prior construction but instead serve to confirm our reading of the Guideline section, ex post facto concerns are not implicated. *Id.*

[19] Prior to Ruiz's sentencing, the Guidelines stated:

> Conviction by trial does not preclude defendant from consideration [for receiving an acceptance of responsibility reduction]. A defendant may manifest sincere contrition even if he exercises his constitutional right to a trial. This may occur, for example, where a defendant goes to trial to assert and preserve issues that do not relate to factual guilt *(e.g.*, to make a constitutional challenge to a statute or a challenge to the applicability of a statute to his conduct).

U.S.S.G. § 3E1.1 comment. (n.2) (Nov. 1989). The revised commentary that the court applied at sentencing provides that the acceptance of responsibility reduction is not intended to apply to a defendant who puts the government to the burden of proof at trial by denying the essential factual elements of guilt, is convicted, and only then admits guilt and expresses remorse. Conviction by trial, however, does not automatically preclude a defendant from consideration for such a reduction. In rare situations a defendant may clearly demonstrate an acceptance of responsibility for his criminal conduct even though he exercises his constitutional right to a trial. This may occur, for example, where a defendant goes to trial to assert and preserve issues that do not relate to factual guilt *(e.g.*, to make a constitutional challenge to a statute or a challenge to the applicability of a statute to his conduct). In each such instance, however, a determination that a defendant has accepted responsibility will be based primarily upon pre-trial statements and conduct.

U.S.S.G. § 3E1.1 comment. (n.2) (Nov. 1990). The district court's application of the sentencing Guidelines is subject to *de novo* review. *United States v. Rodriguez*, 959 F.2d 193, 195 (11th Cir.), *cert. denied*, ____ U.S. ____, 113 S.Ct. 649, 121 L.Ed.2d 563 (1992).

[20] We have previously held that entry of a not guilty plea and insistence upon a trial are factors that may be considered in determining whether a defendant has accepted responsibility for his crime. *United States v. Castillo-Valencia*, 917 F.2d 494, 501 (11th Cir. 1990) (holding that decision to go to trial may not be used to bar categorically an acceptance of responsibility reduction), *cert. denied*, 499 U.S. 925, 111 S.Ct. 1321, 113 L.Ed.2d 253 (1991). Moreover, we have also recognized that a defendant who exercises his right to trial may diminish his chance of being granted the acceptance of responsibility reduction as there is less evidence of acceptance to weigh in his favor. *Rodriguez*, 959 F.2d at 197. Thus, the revised commentary relied on by the district court does not overrule § 3E1.1 but instead accords with our reading of the section. In such cases, the Ex Post Facto Clause is not implicated. Thus, this claim fails. *Cf. Carroll*, 6 F.3d at 746 n.9 (no ex post factor concerns where Guideline amendment regarding definition of a drug does not overrule prior constructions of the Guideline but instead confirms our reading of the Guideline).

2. Eight Amendment

[21] Schwartz claims that his life sentence violates the Eighth Amendment. According to Schwartz, the district court erred by mechanically applying the Guidelines and failing to appreciate that Schwartz did not possess the intent or the ability to purchase the cocaine, and that he could not have distributed it in any event as it was government owned and controlled. Schwartz thus asserts that his sentence is so unjust and harsh as to violate the Eighth Amendment. We reject Schwartz's claim. A review of the record indicates that the court sentenced each Appellant individually. Moreover, even assuming that the court failed to make individualized findings, the sentence may nonetheless be upheld where, as here, the record supports the amount of drugs attributed to the defendant. *United States v. Ismond*, 993 F.2d 1498, 1499 (11th Cir. 1993). Because the amount of drugs attributed to Schwartz was proper, his life sentence is neither cruel nor unusual. *See United States v. Willis*, 956 F.2d 248, 251 (11th Cir. 1992) (Guidelines do not violate Eighth Amendment).

III. CONCLUSION

Appellants' sentences and convictions are AFFIRMED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 90-7890

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus,

DANIEL DEATHERAGE,
OSCAR DIAZ,
BILLY ALLEN,
JOSE MANUEL RUIZ,
KELLY FRED KALINOWSKI,
IRVING SCHWARTZ,
ROBERT LINCOLN FOWLER,
JESUS MANUEL FERNANDEZ,
Defendant-Appellants.

On Appeal from the
United States District Court for the
Southern District of Alabama

ON PETITION(S) FOR REHEARING
AND SUGGESTION(S) OF REHEARING EN BANC

(Opinion July 29, 1994, 11th Cir. 19__, ____ F.2d ____).

Before: EDMONDSON, Circuit Judge, JOHNSON, Senior Circuit Judge, and *PITTMAN, Senior District Judge.

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35,

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*Honorable Virgil Pittman, Senior U.S. District Judge for the Southern District of Alabama, sitting by designation.

ORD-42
(9/90)

Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

J. L. EDMONDSON

UNITED STATES CIRCUIT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ALABAMA

United States of America,

v. Case No. 90-00052

Jesus Manuel Fernandez,

Domingo Soto, Defendant's Attorney

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or
After November 1, 1987)

THE DEFENDANT was found guilty on count(s) 1 after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section: 21 USC 841(a)(1);
Distribute & possess with intent to distribute Schedule II controlled substance (cocaine).

Count Number(s): 5

The defendant is sentenced as provided in pages 2 through 3 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

The defendant has been found not guilty on count(s) 1 & 4 and is discharged as to such count(s).

It is ordered that the defendant shall pay a special assessment of $50.00, for count(s) 5, which shall be due immediately.

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 137-52-5858

Defendant's Date of Birth:

Defendant Mailing Address: In Custody

Defendant's Residence Address:

Date of Imposition of Sentence: December 19, 1990

CHARLES R. BUTLER, JR.
Signature of Judicial Officer

CHARLES R. BUTLER, JR.
UNITED STATES DISTRICT JUDGE
Name & Title of Judicial Officer

Date: December 20, 1990

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of THREE HUNDRED TWENTY-EIGHT (328) MONTHS without parole.

U.S. DISTRICT COURT
SOU.DIST.ALA.
FILE AND ENTERED THIS THE 19th DAY of DECEMBER, 1990, JUDGMENT ENTRY NO. 538-J
JOHN V. O'BRIEN, CLERK
BY LAWRENCE
DEPUTY CLERK

The defendant is remanded to the custody of the United States marshal.

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of FIVE (5) YEARS.

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that

remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

The defendant shall not possess a firearm or destructive device.

Special conditions of the defendant's supervised release term are:

(1) That he not illegally possess any controlled substances.